Supreme Court, U. S.
FILED
FEB 13 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

_____TERM 1978

No. 77-1227

WARREN J. MOITY, SR.

PETITIONER

VERSUS

SWIFT AGRICULTURAL CHEMICAL CORPORATION

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS, NEW ORLEANS, LOUISIANA

INDEX AND CASE CITATIONS AND THE LAW

INDEX AND CASE CITATIONS AND THE LAW

INDEX

INDEX

IN THE

SUPREME COURT OF THE UNITED STATES

____TERM 1978

==========

NO.____

==========

WARREN J. MOITY, SR.

Petitioner

versus

SWIFT AGRICULTURAL CHEMICAL CORPORATION

Respondent

==========

MOTION TO STAY JUDGMENT

==========

On motion of WARREN J. MOTIY, SR., plaintiff-appellant, appearing herein in his own proper person, a layman, appearing herein pursuant to Rule 50 and 51, of the United States Supreme Court and suggest to this Honorable Court, that;

1.

The judgment rendered is contrary to the law and the evidence.

2.

That mover has exhausted his state remedies as well as the United States Courts and has no place to proceed further than the United States Supreme Court to protect his rights guaranteed by law and the Constitution of the United States of America and of the Constitution of the State of Louisiana.

3.

That further great damage and irreparable injury will result unless a stay order is granted in the form of a temporary restraining order of the United States District Court for the Western District of Louisiana, Opelousas Division, on the 26th day of July 1977, dismissing plaintiff-appellant's complaint.

4.

That a stay order should issue preventing the 27th Judicial Court from enforcing the judgment rendered in Civil Action No.66536-2, Entitled WARREN J. MOITY VS. SWIFT AGRICULTURAL CHEMICALS CORPORATION until a hearing can be had and to determine the outcome of the proceeding in this the United States Supreme Court. That the ends of justice will best be served and that no damage can result in this delay to the defendant-appellee by granting this stay order.

W H E R E F O R E, plaintiff-appellant most respectfully prays that this motion be granted and that proper stay orders issue staying all proceedings until this court reaches a final determination of this case and for all general relief, etc.

WARREN J. MOITY, SR.
IN PROPERIA PERSONA,
A LAYMAN
P. O. BOX 52229
LAFAYETTE, LOUISIANA
70501

O R D E R

Considering the above motion, all proceedings both in the 27th Judicial District Court bearing Docket No.66,536-2 and the United States District Court, Western District of Louisiana, bearing Docket No. 77-0484-0. The United States Fifth Circuit Court of Appeals bearing Docket No.77-0484, be and they are hereby stayed and temporarily restrained from enforcement of any orders or judgment until this Court reaches a final determination in this case.

Washington, D.C.,_____1978.

_____

JUSTICE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing brief has been duly served upon Swift Agricultural Chemicals Corporation by serving a copy thereof on it's attorney Edward C. Able, Esquire properly addressed to him at his law office at Lafayette, Louisiana.

Lafayette, Louisiana, this__day of_____ 1978.

_____

WARREN J. MOITY, SR.

IN THE

SUPREME COURT OF THE UNITED STATES

____TERM 1978

==========

WARREN JAMES MOITY, SR.

Petitioner

versus

SWIFT AGRICULTURAL CHEMICAL CORPORATION

Respondent

==========

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT, NEW ORLEANS DIVISION,
NEW ORLEANS, LOUISIANA

OPINIONS BELOW

1. United States District Court, Western District of Louisiana, holding no jurisdiction, and is annexed hereto as Appendix "A".

2. Writ Denied L.s.ct.annexed hereto, Appendix "B".
3. Final Judgment, U.S.D.C. is annexed as Appendix "C".
4. Appeal From U.S.D.C., Stay Order Denied is annexed as Appendix "D".
5. Petition For Rehearing, 5th Circuit is annexed as Appendix "E".
6. 5th Circuit, Motion To Stay, Denied is annexed as Appendix "F".
7. Application For Rehearing, 5th Circuit is annexed as Appendix "G".
8. Application For Rehearing, En Blanc, Denied is annexed as Appendix "H".
9. Reasons For Judgment, 27th Judicial District Court, St. Landry Parish is annexed as Appendix "I".
10. Appeal, 3rd Circuit La. is annexed as Appendix "J".

JURISDICTION

1, This application for Writs of Ceriorari is taken within 60 days time prescribed by law from judgment of United States Fifth Circuit, New Orleans, Louisiana, dated 12-1-77 (Appendix .

2. The decision of the State Court was a constitutional violation and in violation of the "Preamble" to the La. Constitution and left no other recourse but the United States Courts.

   28 U.S.C. 2101 an appeal to the United States Supreme Court shall be taken within 30 days from date of last judgment.

   (Ninety (90) days) (c).

   28 U.S.C. 2106 SUPREME COURT MAY MODIFY, VACATE, SET ASIDE, OR REVERSE ANY JUDGMENT, DECREE OR ORDER OF A COURT, BROUGHT BEFORE IT FOR REVIEW.

   WRIT CERTIORARI

   28 U.S.C. 1254 (1) (2) U.S. Supreme Court may have jurisdiction on certiorari from Court of Appeals 5th Circuit.

   28 U.S.C. 1343 (3) (4) CIVIL RIGHTS ACT.

3. The decision was in violation of Article 1, Section 3 of the Constitution of Louisiana in that the decision was arbitrarily, capriciously and unreasonably discriminating against petitioner. That petitioner's only recourse was and is the United States Courts.

BEST COPY AVAILABLE

4. *Constitutional Question:* That under Article 5, Section 8 and 10 and 10 C-B of the Louisiana Constitution the Third Circuit Court of Appeals is restricted to decide cases strictly on law and the evidence. That the only recourse to petitioner is the United States Courts.

5. *Constitutional Question:* That Article 2, Section 2, Louisiana Constitution provides that only the Louisiana Legislature can give/and or create laws on procedure and evidence in civil cases. That petitioner has exhausted all remedies save and except the United States Supreme Court.

6. *Constitutional Question:* That Article 1, Section 23 and 24 of the Louisiana Constitution prohibits any law which impairs petitioners rights. That the only unexhaustable resource is the United States Supreme Court.

7. That under the due process and equal protection clause of the United States Constitution petitioner is entitled to redress and the only source and avenue available is the United States Supreme Court. Article 1, Section 10 U.S. Constitution. Also, Article 14, Section 1, United States Constitution. Article 4, U.S. Constitution.

STATEMENT OF CASE

This was and is a product liability case.

Petitioner-appellant, was in the cattle raising business. The plaintiff entered into a contract with the defendant-appellee, to purchase rye grass seed and fertilizer, to be planted and fertilized by the defendant, Swift Agricultural Chemical Corporation, for a fixed amount of money. The rye grass did not come up and plaintiff had no pasture.

Many cattle died and large losses resulted. As a result of said losses, plaintiff-petitioner herein filed a lawsuit in the 27th Judicial District Court, in and for the Parish of St. Landry, Louisiana, the domicile of Swift Agricultural Chemical Corporation, which plaintiff contracted with to plant the rye grass and fertilize the pastures located in Iberia Parish, Louisiana on land owned by petitioner. The grass did not grow. A lawsuit resulted and trial was held before the Honorable Isom J. Guillory, Judge of the 27th Judicial District Court at Opelousas, Louisiana.

On February 28, 1975, Judge Guillory found and held that the rye grass seed was dead when it was planted and that was why the rye grass did not come up. The Judge granted judgment accordingly. The Judge did not allow full damages as prayed for and both the plaintiff and defendant appealed the case to the Third Circuit Court of Appeals at Lake Charles, Louisiana.

The Third Circuit Court with Judges Edwin L. Guidry, Judge Hood and Judge Foret presided. The Third Circuit reversed Judge Isom Guillory and granted judgment to the defendant-appellee as prayed for, plus all costs.

Judge Guidry, FROM THE BENCH STATED *"He was a farmer and that it was a bad year for rye grass. That he had been farming for many years and that the rye grass seed was not bad. The grass did not grow because the grass seed was planted on unplowed land."*

Plaintiff-appellant applied for Writs to the Louisiana Supreme Court but they were denied.

Suit was then filed on a Constitutional Question in the United States District Court for the Western District of Louisiana, Opelousas Division. The Court dismissed the suit for LACK OF JURISDICTION. The plaintiff appellant appealed to the United States Fifth Circuit Court of Appeals at New Orleans, Louisiana. The Fifth Circuit also held the suit lacks JURISDICTION and refused to stay the enforcement of the judgment in the Louisiana Courts against plaintiff-appellant.

Plaintiff-appellant herein seeks CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT AT NEW ORLEANS, LOUISIANA, AND ALSO SEEKS A STAY ORDER, PROHIBITING THE ENFORCEMENT OF THE JUDGMENT GRANTED THE DEFENDANT, SWIFT AGRICULTURAL CHEMICAL CORPORATION, BY THE LOUISIANA THIRD CIRCUIT COURT OF APPEALS, THE UNITED STATES DISTRICT COURT, THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS AT NEW ORLEANS, LOUISIANA, plus all costs of these proceedings.

QUESTIONS PRESENTED

1. Did the United States District Court have jurisdiction under 28 United States Code, Section 1331, involving Constitutional Questions involving the Constitution of the State of Louisiana and also the Constitution of the United States of America?

2. Does the United State District Court have jurisdiction on cases involving 28 United States Code 1343, as well as the Constitution of the United States and the State of Louisiana?

The Courts below says "No".

SPECIFIC QUESTION: Can a judge of a State Court of Appeal, without any evidence being into the record to that effect, state during the hearing while the case is on appeal before him and two other justices, openly say, *"He is a farmer, that it was a bad year for rye grass, that it was not the fault of the seed. That the seed had been planted on unplowed land. That was the reason no grass came up."* Particularly, when the record has the evidence and the State District Court ruled that the rye grass seed was dead when planted and gave judgment to petitioner on February 28, 1975. That such action is reversible error.

3. Based upon those violations of Petitioners Constitutional and Civil Rights, did the United States District Court and the 5th Circuit Court of Appeals, have jurisdiction in this case and should they not have issued a stay order prohibiting the enforcement of the State Court Judgment in this case?

4. Should the United States Supreme Court grant a Writ of Certiorari and grant a Stay Order on all proceedings until a determination is reached by the United States Supreme Court? And for all costs.

STATUTORY AUTHORITIES

Petitioner, a layman, appearing herein in his own proper person seeking the understanding in Connolly Vs Connoly, La. App., 316 So. 2d 167, shows that his only remaining recourse is the United States Supreme Court. Petitioner has exhausted all other remedies.

The State Courts have ignored it's responsibility under following:

THE LOUISIANA CONSTITUTION

(a) The "Preamble" to the Louisiana Constitution.

(b) Article 1, Section 3, of the Louisiana Constitution in that the decision is unreasonable, illegal, discriminatory, arbitrary, capriciously wrong against your petitoner.

(c) Article 5, Section 8, 10, and 10 (B) of the Louisiana Constitution requires that the Third Circuit Court of Appeals for the State of Louisiana be restricted to decide cases on the law and the evidence, which was not done in this case and is illegal, leaving the only recourse to petitioner being the United States Courts if justice is to be received fairly and impartially.

(d) That Article 2, Section 2, of the Louisiana Constitution provides that the Louisiana Legislature can give and create laws on procedure and evidence in civil cases. That petitioner has exhausted his remedies in State Courts.

(e) That the Court of Appeals in 1964, ruled in Hudson Vs. Arceneaux, 169 So. 2d 731, application denied 170 So. 2d 868, certiorari denied 86 S. Ct. 114, 381 U.S. 858. Petitioner has no other recourse but the United State Courts. Jurisdiction in the United States Courts is had under 28 U.S.C. 2281, in that petitioner and rehearing order and injunction, restraining order to stop the enforcement of a decision in the State Courts which based upon laws of the State of Louisiana. The only place to settle a constitutional question is in the United States Courts.

(f) The decisions of the United States District Court for the Western District of Louisiana, Opelousas Division and the United States Court of Appeal for the Fifth Circuit at New Orleans, erred in not granting jurisdiction as it is violative of Article 1, 4, 5, 6 and 14th Amendments of the United States Constitution as it amounts to preventing petitioner from a fair and impartial serious trial on Constitutional and Civil Rights Questions.

ARGUMENT

Certiorari should be granted this case on an issue of not having true freedom of the courts as guaranteed by the Constitution of the United States of America and also the Constitution of Louisiana.

Further, that it is not denied by defendant-appellee, that the comments made by Judge Guidry of the Third Circuit Court of Appeals, for Louisiana, were in direct violation of the decisions in Hudson Vs. Arceneaux, 169 So. 3d 731, application denied, 170 So. 2d 868, Certiorari from the United States Supreme Court was and is cited as 86 S. Ct. 114, 381 U.S. 858.

The holding of the Louisiana Courts as it did in this case, is in direct violation, of the decisions of the United States Supreme Courts.

Petitioner having exhausted his remedy in the Louisiana State Courts had no other court available to him but the United States District Court and the United States Fifth Circuit Court of Appeals in New Orleans.

Those courts should have held that because of the Constitutional Questions alone, that they had jurisdiction, as claimed by your petitioner herein.

The United States Constitution Article 1, 4, 5, 6 and the 14th Amendments thereof grants jurisdiction in this case. When justice falls in the state court system the only recourse to protect human constitutional rights and fair and impartial justice are in the United States Courts.

The stage is set, therefore, for the United States Supreme Courts to now settle these conflicting views of the true meaning of the law and the Constitution of the State of Louisiana and the Constitution of the United States of America.

A WRIT OF CERTIORARI SHOULD ISSUE, to review the orders and judgments and the decisions of the United States District Court for the Western District of Louisiana, Opelousas Division and also review those orders of the United States Court of Appeal for the Fifth Circuit at New Orleans, Louisiana.

A STAY OF THE ORDERS DECISIONS, AND JUDGMENTS OF THOSE COURTS SHOULD BE ISSUED BY THE UNITED STATES SUPREME COURT TO PREVENT FURTHER IRREPARABLE INJURY FROM RESULTING.

AND, FOR ALL COSTS, ORDERS AND DECREES THAT JUSTICE AND THE LAW REQUIRES.

SUMMARY AND CONCLUSION

This case presents most serious CONSTITUTIONAL QUESTIONS. Those questions must be resolved and I feel the United States Supreme Court will resolve them.

The JUDICIAL MACHINES of the Third Circuit of Appeals for the great State of Louisiana and the Louisiana State Supreme Court rejected those rights guaranteed by law. Citizens are further protected by both, the Constitution of the great State of Louisiana and also the Constitution of the United States of America.

The Judge of the Third Circuit of Louisiana, the Honorable Edwin L. Guidry, who positively did not testify in the case herein, made himself an EXPERT in the FIELD OF FARMING. Yes, in a case whereby, HE WAS ONE OF THE JUSTICES OF THE THIRD CIRCUIT deciding the case, made the statement, *"He had been a farmer for many years and a cattle raiser. The fertilizer nor the seed did damage, it was just a bad year for rye grass. That because of the unplowed land, the rye did not come up."*

The ABOVE STATEMENT HAD TO HAVE BEARING OF A SERIOUS NATURE IN HIS DECISION and the DECISIONS OF THE TWO JUSTICES as well as THE LOUISIANA STATE SUPREME COURT in not GRANTING RELIEF sought by your petitioner herein.

The DECISION of the Honorable Edwin L. Guidry to INJECT TESTIMONY into the record, WHICH WAS NOT INTO THE RECORD TO BE CONSIDERED, was fatal to petitioner and his losses in this case.

The only position for the UNITED STATES SUPREME COURT to take in this case, is that such action was in direct violation of the holding of the UNITED STATES SUPREME COURT in Hudson Vs. Arceneaux cited above. Further, such a decision and the injection of a JUSTICES OPINION as a FARMING EXPERT, when he was not a witness in the case, much less an expert in the field of farming, is in direct violation of the Constitution of the State of Louisiana and also the Constitution of the United States of America. That for that reason, the United States District Court and the United States Court of Appeals erred by not granting jurisdiction in this case.

That this court should hold that petitioner did not GET A FAIR AND IMPARTIAL TRIAL, AND WAS PREVENTED FROM GETTING HIS DAY IN COURT.

Respectfully submitted,

WARREN J. MOITY, SR.
P. O. BOX 52229 O.C.S.
LAFAYETTE, LOUISIANA
70504
318-232-0855 or 365-1407

Dated:_____1978.
Lafayette, Louisiana

CERTIFICATE

I, Warren J. Moity, Sr., hereby certify that a copy of this application for Writ of Certiorari has this date been served upon counsel for Swift Agricultural Chemical Corporation through it's attorney, Edward C. Abel, Esquire, properly addressed, postage prepaid in the United States Mail.

Lafayette, Louisiana_____1978.

WARREN J. MOITY, SR.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF LOUISIANA

OPELOUSAS DIVISION

WARREN J. MOITY	:	CIVIL ACTION
-vs-	:	NO.77-0484-0
SWIFT AGRICULTURAL CHEMICALS CORP.	:	

Appendix "A"

ORDER OF DISMISSAL

Plaintiff's complaint and the attachment thereto having been considered, the lack of jurisdiction being apparent on the face of the record.

LET this cause be and it is hereby DISMISSED.

Alexandria, Louisiana, this the 10th day of May, 1977.

NAUMAN S. SCOTT-
Chief Judge

SUPREME COURT OF LOUISIANA

New Orleans, 70112

WARREN J. MOITY Appendix "B" April 27, 1977

V.

SWIFT AGRICULTURAL CHEMICAL CORPORATION NO.59,607

- - - -

In re: Warren J. Moity applying for certiorari, or writ of review, to the Court of Appeal, Third Circuit, Parish of St. Landry

- - - -

Writ denied. On the facts found by the court of appeal, the result is correct.

/s/JLD

/s/JWS

/s/FWS

/s/AT JR

/s/PFC

/s/WFM

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
April 27, 1977

/s/ Phil Trice
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF LOUISIANA

OPELOUSAS DIVISION

WARREN J. MOITY	:	CIVIL ACTION
-vs-	:	NO.77-0484-0
SWIFT AGRICULTURAL CHEMICALS CORPORATION		Appendix "C"

FINAL JUDGMENT

The court having entered an order of dismissal for lack of jurisdiction on May 10, 1977, there being no just reason for delay of an entry of final judgment, it is

ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, Swift Agricultural Chemicals Corporation, and against plaintiff, Warren J. Moity, dismissing this action for lack of jurisdiction, without prejudice, and at plaintiff's cost.

Alexandria, Louisiana, this 26th day July, 1977.

/s/ Nauman S. Scott
NAUMAN S. SCOTT-
Chief Judge
Western District of
Louisiana

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-2248

Appendix "D"

WARREN J. MOITY,

Plaintiff-Appellant

versus

SWIFT AGRICULTURAL CHEMICALS CORPORATION,

Defendant-Appellee.

- - - -

Appeal from the United States District Court for the Western District of Louisiana

- - - -

Before COLEMAN, GODBOLD and TJOFLAT, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's pro se motion for stay pending appeal is DENIED. The judgment of the District Court dismissing the case for lack of federal jurisdiction is AFFIRMED.

IN THE

UNITED STATES COURT OF APPEALS FOR THE

FIFTH CIRCUIT

NO.77-2248

Appendix "E"

WARREN JAMES MOITY, SR.

Appellant,

versus

SWIFT AGRICULTURAL CHEMICALS CORPORATION

Appellee

APPEALED FROM UNITED STATES DISTRICT

COURT FOR THE WESTERN DISTRICT

OF LOUISIANA

PETITION FOR RE-HEARING AND

SUGGESTION FOR RE-HEARING IN BLANC

IN BEHALF OF APPELLANT,

WARREN JAMES MOITY, SR.

WARREN JAMES MOITY, SR.
A LAYMAN,
IN PROPER PERSON
P. O. BOX 52229 O.C.S.
LAFAYETTE, LOUISIANA
70504
(318) 232-0855

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CITATIONS

IN THE

UNITED STATES COURT OF APPEALS FOR THE

FIFTH CIRCUIT

NEW ORLEANS DIVISION

NO.77-2248

WARREN JAMES MOITY, SR.

Plaintiff-Appellant

versus

SWIFT AGRICULTURAL CHEMICALS CORPORATION

Defendant-Appellee

APPEALED FROM UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT

OF LOUISIANA

OPELOUSAS, LOUISIANA DIVISION

PETITION FOR RE-HEARING AND

SUGGESTION FOR RE-HEARING IN BLANC

IN BEHALF OF APPELLANT,

WARREN JAMES MOITY, SR.

TO THE HONORABLES,

THE JUDGES OF THE UNITED STATES

COURT OF APPEALS

FOR THE FIFTH CIRCUIT,

NEW ORLEANS, LOUISIANA DIVISION:

PRELIMINARY STATEMENT

Comes now, WARREN JAMES MOITY, SR., Plaintiff-Appellant, in the above styled and numbered cause and presents this petition for re-hearing a suggestion for re-hearing in banc, by the Court pursuant to Rule 40 of the Rules Appellate Procedure, and also Rule 35.

ISSUE 1

THE APPELLANT, WARREN JAMES MOITY, SR. is entitled to a reversal of his judgment by this Court rendered on November 7, 1977, because it is contrary to law and the Constitution of the United States of America, when it holds it lacks jurisdiction under 28 U.S.C. § 2281 and also under the Constitution of the United States of America.

When the state courts fail to decide cases according to law, justice, and equal protection of the law to all citizens the United States District Court must be depended upon for protection. In this case, the state judge decided this case on his experience instead of the law. Their can be no Civil Rights for a citizen nor citizens alike unless the courts are open to all equally and justice be the same for all citizens and also your petitioner.

Petitioner, a layman, appearing herein seeking the protection of this Honorable Court pursuant to Connolly V. Connolly, 1975, cited as 316 So. 2d 167, in providing that protection granted under 28 U.S. S. 2281. That this Honorable Court erred when it denied jurisdiction for a Judge of the Louisiana Third Court of Appeal making statements about this case in violation of the La. App. Court 1964 ruling in Hudson V. Arceneaux, 169 So. 2d 731, application denied 170 So. 2d 868, Certiori denied 86 S. Ct. 114, 381 U.S. 858.

Plaintiff-Appellant has absolutely no other recourse but to seek relief in the United States Courts or be destroyed by the unfair rulings of the Louisiana Third Circuit Court of Appeals, and the Louisiana Supreme Court. Plaintiff-Appellant has exhausted all his state remedies and must now depend on the Constitution of the United States of America and the Civil Rights Acts or be deprived of equal justice under the law.

Counsel for defandant-appellee admits and does not deny mover was wronged by the Louisiana State Judges. The only courts to correct this injustice is the United States Courts to which I am appealing.

CONCLUSION

In view of the law herein cited, authorities, the appellant herein fully suggest a re-hearing in this cause and that the court grants this petition for a re-hearing and that the judgment rendered in this case be recalled, set aside and that judgment be rendered in favor of appellant granting jurisdiction in the United States District Court and eventually to granting the relief sought in the Courts of the State of Louisiana and the United States District Court for the Western District of Louisiana, and the United States District Court for the Western District of Louisiana, Opelousas Division.

PRAYER

Wherefore, premises considered, the Appellant, Warren J. Moity, Sr., respectfully suggest a re-hearing in banc and that upon a re-hearing in this cause, the court grant this petition for re-hearing and the judgment rendered by this Honorable Court be set aside and withdrawn, that jurisdiction be fully granted, that this cause in all things be reversed and the judgment to the District Court, plus appellee pay all costs, etc.,

Respectfully submitted,

WARREN JAMES MOITY, SR.
A LAYMAN, IN PROPER PERSON
P. O. BOX 52229 O.C.S.
LAFAYETTE, LOUISIANA
70504
(318) 232-0855

C E R T I F I C A T E

I certify that a copy of this motion has this date been mailed to Edward Abel, Esquire, Counsel for Swift Agricultural Chemicals Corporation, properly addressed United States Mail, Postage Prepaid.

Lafayette, Louisisna, September__, 1977.

WARREN J. MOITY, SR.

MOTION TO STAY JUDGMENT

On motion of WARREN J. MOITY, SR., plaintiff-appellant, appearing herein pursuant to Rule 8 (a), of the Federal Rules of Appellate Procedure and also Rule 65 of Federal Rules ov Court Procedure most respectfully suggest to this Honorable Court, that;

1.

The judgment rendered is contrary to law and the evidence.

2.

That mover has exhausted his state remedies and has no place to proceed further than the United States District Court to protect his rights guaranteed by law and the constitution of the United States of America and of the Constitution of the State of Louisiana.

3.

That further great damage and irreparable injury will result unless a stay order is granted in the form of a Temporary Restraining Order, preventing defendant-appellee from the enforcement of the judgments of the United States District Court for the Western District of Louisiana, Opelousas Division, on the 26th day of July 1977, dismissing plaintiff-appellant's complaint.

4.

That a stay order should issue preventing the 27th Judicial Court from enforceing the judgment rendered in Civil Action No.66536-2, Entitled Warren J. Moity Vs. Swift Agricultural Chemicals Corporation until a hearing can be had and to determine the outcome of the proceeding in this the Fifth Circuit Court of Appeals. That the ends of justice will best be served and that no damage can result in this delay to the defendant-appellee by granting this stay order.

W H E R E F O R E, plaintiff-appellant most respectfully prays that this motion be granted and that proper stay orders issue staying all proceedings until this court reaches a final determination of this case and for all general relief, etc.

WARREN J. MOITY, SR.
IN PROPERIA PERSONA,
A LAYMAN
P. O. BOX 52229 O.C.S.
LAFAYETTE, LOUISIANA 70504

O R D E R

Considering the above motion, all proceedings both in the 27th Judicial District Court bearing Docket No.66,536-2 and the United States District Court, Western District of Louisiana, bearing Docket No.77-0484-0, be and they are hereby stayed and temporarly restrained from enforcement until this Court reaches a final determination in this case.

New Orleans, Louisiana,_____1977.

JUSTICE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing brief has been duly served upon Swift Agricultural Chemicals Corporation by serving a copy thereof on it's attorney Edward C. Able, Esquire properly ad7ressed to him at his law office at Lafayette, Louisiana.

Lafayette, Louisiana, this__day of_____ _____1977.

WARREN JAMES MOITY, SR.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO.77-2248

APPENDIX "F"

WARREN J. MOITY,

Plaintiff-Appellant,

versus

SWIFT AGRICULTURAL CHEMICALS CORPORATION,

Defendant-Appellee.

- - - -

Appeal from the United States District Court for the Western District of Louisiana

- - - -

Before GODBOLD and TJOFLAT, Circuit Judges.

B Y T H E C O U R T :

IT IS ORDERED that appellant's motion for stay order of judgment is DENIED.

U.S. COURT OF APPEALS
FILED
DEC 12'77
EDWARD W. WADSWORTH
CLERK

IN THE

UNITED STATES COURT OF APPEALS FOR THE

FIFTH CIRCUIT

No.77-2248

WARREN JAMES MOITY, SR.

APPELLANT,

Appendix "G"

VERSUS

SWIFT AGRICULTURAL CHEMICALS CORPORATION

APPELLEE

APPEALED FROM UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF LOUISIANA
OPELOUSAS, LOUISIANA DIVISION

PETITION FOR RE-HEARING AND
SUGGESTION FOR RE-HEARING IN BLANC
IN BEHALF OF APPELLANT,
WARREN JAMES MOITY, SR.

WARREN JAMES MOITY, SR.
A LAYMAN,
IN PROPER PERSON
P. O. BOX 52229 O.C.S.
LAFAYETTE, LOUISIANA
70504
(318) 232-0855

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

UNITED STATES COURT OF APPEALS FOR THE

FIFTH CIRCUIT

NEW ORLEANS DIVISION

NO.77-2248

WARREN JAMES MOITY, SR.

PLAINTIFF-APPELLANT

VERSUS

SWIFT AGRICULTURAL CHEMICALS CORPORATION

DEFENDANT-APPELLEE

APPEALED FROM UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF LOUISIANA
OPELOUSAS, LOUISIANA DIVISION

PETITION FOR RE-HEARING AND
SUGGESTION FOR RE-HEARING IN BANC
IN BEHALF OF APPELLANT,
WARREN JAMES MOITY, SR.
TO THE HONORABLES,
THE JUDGES OF THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NEW ORLEANS, LOUISIANA DIVISION:

PRELIMINARY STATEMENT

Comes now, WARREN JAMES MOITY, SR., Plaintiff-Appellant, in the above styled and numbered cause and presents this his petition for re-hearing a suggestion for re-hearing in banc, by the Court pursuant to Rule 40 of the Rules of Appellate Procedure, and also Rule 35.

ISSUE 1

THE APPELLANT, WARREN JAMES MOITY, SR. is entitled to a reversal of his judgment by this Court rendered on November 7, 1977, because it is contrary to law and the Constitution of the United States of America, when it holds it lacks jurisdiction under 28 U.S.C. § 2281 and also the Constitution of the United States of America.

When the state courts fails to decide cases according to law, justice and equal protection of the law to all citizens, the United States District Courts must be depended upon for protection. In this case, the state judge decided this case on his experience instead of the law. There can be no Civil Rights for a citizen, nor can there be due process or equal protection under our laws for all citizens alike unless the courts are open to all equally and justice be the same for all citizens and also your petitioner.

Petitioner, a layman, appearing herein seeking the protection of this Honorable Court pursuant to Connolly v. Connolly, 1975, cited as 316 So. 2d 167, in providing that protection granted under 28 U.S. S. 2281. That this Honorable Court erred when it denied jurisdiction for a Judge of the Louisiana Third Court of Appeal making statements about this case in direct violation of the La. App. Court 1964 Ruling in Hudson V. Arceneaux, 169 So. 2d 731, application denied 170 So. 2d 868, Certiori denied 86 S. Ct. 114, 381 U.S. 858.

Plaintiff-Appellant has absolutely no other recourse but to seek relief in the United States Courts or be destroyed by the unfair rulings of the Louisiana Third Circuit Court of Appeals, and the Louisiana Supreme Court. Plaintiff-Appellant has exhausted all his state remedies and must now depend on the Constitution of the Untied States of America and the Civil Rights Acts or be deprived of equal justice under the law.

Counsel for Defendant-Appellee admits and does not deny mover was wronged by the Louisiana State Judges. The only courts to correct this injustice is the United States Courts to which I am appealing.

CONCLUSION

In view of the law herein cited, authorities, the appellant herein fully suggest a re-hearing in this cause and that the court grants this petition for a re-hearing and that the judgment rendered in this case be recalled, set aside and that judgment be rendered in favor of appellant granting jurisdiction in the United States District Court and eventually to granting the relief sought in the Courts of the State of Louisiana and the United States District Court for the Western District of Louisiana, Opelousas Division.

PRAYER

WHEREFORE, premises considered, the Appellant WARREN J. MOITY, SR., respectfully suggest a re-hearing in banc and that upon a re-hearing in this cause, the court grant this petition for re-hearing and the judgment rendered by this Honorable Court be set aside and withdrawn, that jurisdiction be fully granted that this cause in all things be reversed and the judgment to the District Court, plus appellee pay all costs, etc.,

Respectfully submitted,

WARREN JAMES MOTIY, SR.
A LAYMAN,
IN PROPER PERSON
P. O. BOX 52229 O.C.S.
LAFAYETTE, LOUISIANA
70504 (318) 232-0855

CERTIFICATE

I certify that a copy of this motion has this date been mailed to Edward Abel, Esquire, Counsel for Swift Agriculture Chemicals Corporation, properly addressed, United States Mail, Postage Prepaid.

Lafayette, Louisiana, September__, 1977.

WARREN J. MOITY, SR.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 77-2248

Appendix "H"

WARREN J. MOITY,

Plaintiff-Appellant,

versus

SWIFT AGRICULTURAL CHEMICALS CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(December 1, 1977)

Before COLEMAN, GODBOLD and TJOFLAT, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ JOHN C. GODBOLD
United States Circuit Judge

REASON FOR JUDGMENT

WARREN J. MOITY	)NO.66,536-2, CIVIL DOCKET
VS.	)27TH JUDICIAL DISTRICT COURT OF LA.
SWIFT AGRICULTURAL CHEMICAL CORPORATION.	)IN AND FOR THE PARISH OF ST. LANDRY.

Appendix A

This is a "Products Liability" case.

The Plaintiff alleges he received defective rye grass seed, didn't get winter pasture, and lost cattle as a result thereof.

The suit basically one for breach of contract (breach of guarantees and warranty), and, alternatively in redhibition.

The Court finds that on the facts presented, the Defendant began with certified, viable seed. In all of the testimony, no evidence was presented which showed the contrary. However, the rye grass seed was mixed, in advance of planting, by the Defendant, with Ammonium Nitrate, a fertilizer. It was allowed to stand one or more nights so mixed; and, the Court finds as a fact that the ammonium nitrate "burned" or killed the seed. The experts testify that this type of fertilizer has an affinity for taking water from objects it comes in contact with. The Court finds that this happened and the fertilizer killed the seed. (The dealer planted the seed for the plaintiff as per their agreement.)

What confirms the Court's opinion that the seed was killed is the preponderance of the evidence of the lay witnesses, who testified that no germination at all took place. There was some germination along the road, but the Court feels it was not proved that this germination was tied to the original planting. Also, other seed germinated.

Accordingly, we have the case of a seller or dealer and not that of a manufacturer. Further, no Article 2315 allegation has been made, although a tortious act was committed, which was the proximate cause of some of the loss which ensued.

Taking up the question of rehibition, as a minimum consideration, even if the seller is in good faith, under Article 2531 RCC, the buyer is entitled to reimbursement of the sale price. However, the buyer has not paid the purchase price so the judgment may be written as a Judgment denying the right of the seller to claim the purchase price.

The above is pitched, at a minimum, in the event the seller is in good faith.

If the seller is in bad faith, then, of course under Article 2545 RCC, he is liable not only for the price but for damages and attorney fees. Article 2545 declares "The seller, who knows the vice of the thing he sells---''(underscoring supplied) Article 2545 does not say "who knows or should know"

After reading all of the cases cited in the article, "The Remedy of Redhibition: A Cause Gone Wrong" in the July, 1974 issue of the Louisiana Bar Journal; after following these cases, through Shepard's into other cases, and then reading these cases; after reading the article in the Loyola Law Review beginning at Page 559 of Vol. 20, No. 3, and then reading a number of the cases cited; after reading the numerous cases cited by counsel; and after reading other cases cited by other counsel in another "products liability" case before this Court; this Court does not feel that, as yet, the jurisprudence has engrafted "should have known" on the reading of Article 2545.

It could well be done by making "knows" an equivalent of "bad faith", and then considering that where, as in this case, the breach of duty by the seller is a tort, that the seller knows, or is in bad faith, which is equivalent to knowledge; or that the commission of a tort is "knowledge or "bad faith". The Court does not feel the jurisprudence has gone this far with respect to a seller under Article 2545. Accordingly, the damages and attorney fees can't be allowed under the Redhibition allegation.

Before turning to the question of breach of contract, which was alleged, the Court observes that as a safety measure an Article 2315 allegation may have been tenable, as there was a tort. However, this allegation is not made.

The problem of breach of contract is a fairly close question. Under Article 2475 RCC the seller warrants (1) that of delivery (2) and the thing. Article 2476 RCC declares this has two objects: (1) the buyer's peacable possession, and (2) the warranty against hidden defects o redhibitory vices: Mercedes Benz 262 La. 80;262 So. 2d 377 (1972) and other cases refer to this latter warranty as one of fitness for intended use".

Accordingly, when seed was sold, there was a legal contract warranty as to fitness. If the transaction stopped there, it might be argued that the correlative and exclusive remedy was the action in redhibition. But, the contract encompasses more that the sale of fertilizer and the sale of seed. It contemplated the planting of the seed by the Defendant.

Accordingly, that transaction was not a mere sale, but a contract, which contained as an element, the furnishing of seed, and, for that matter, the furnishing of fertilizer.

The Defendant callously asserts that it did not guarantee a pasture. That is true, but it certainly guaranteed fertilizer that would act as such, and seeds that would germinate in the ordinary scheme of things. This guarantee or warranty (and, the contract) was breached by negligence, which constitutes a tort. The fact that the breach was a tort is inconsequential to this analysis, because the breaxh of contract may or may not be a tort.

Since there was then a breach of contract, the consequences must be assessed by Article 1934 RCC.

Again we are faced with the definition of "bad faith", because paragraphs 1 and 2 of the Article differentiate the consequences.

Paragraph 1 provided that with no fraud or bad faith, the damages are such as "were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract". It then defines "bad faith".

Paragraph 2 declares where there is fraud or bad faith the damages are not only those of paragraph 1, but "such as are the immediate and direct consequence of the breach of that contract."

Paragraph 3 has an interesting observation:

"Although the general rule is, that damages are the amount of the loss the creditor has sustained, or of the gain which he has been deprived, yet there are cases in which damages may be assessed without calculating altogether on the pecuniary loss, or the privation of pecuniary gain to the party. Where the contract has for its object the gratification of same intellectual enjoyment, whether in religion, morality or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach; a contract

for a religious or charitable foundation, a promise of marriage, or an engagement for a work of some of the fine arts, are objects and examples of this rule.

In the assessment of damages under this rule, as well as in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the judge or jury, while in other cases they have none, but are bound to give such damages under the above rules as will fully indemnity the creditor, whenever the contract has been broken by the fault, negligence, fraud or bad faith of the debtor."

This, of course, more or less opens the duty-risk analysis of Judge Barham in Hill 260 La. 542; 256 So. 2d 620 (1972).

Let us now turn out attention to the damages to be assesses. First of all, under the above analysis, attorney fees are not allowable. The sale price is forgiven. We must then inquire as to what other damages are, in fact, allowable.

First of all, Dr. Lambert, Plaintiff's witness does not attribute the loss of cattle to the lack of rye grass until after the 1st of the year in 1974. (This is confirmed more or less by the testimony of Dr. Desselle, an agromony specialist, who testified that it takes about 60 days to get rye grass to a height of 8" to 10", which is the proper height for grazing.)

(Dr.Monroe says it takes several weeks to get to 6" to 8". Since the seed was planted in late September, it would take through October and into November to provide grazing; and, it appears to the Court that Dr. Lambert's idea was that November and December deaths of cattle were too soon to be attributable to lack of rye grass.)

After January 1, if Dr. Lambert's testimony is closely examined, it is apparent that he is not sure the subsequent deaths were due to lack of rye grass (All of his testimony should be examined.) The Court feels that the above though is true, because when the rye grass did not come up immediately, Mr. Moity should certainly have acted to do something to minimize what he could see coming. This Court feels that Mr. Motiy simply went into the cattle business unprepared, and that his tremendous losses were due as much to his inexperience, lack of foresight, and lack of planning, as to any other cause. The Court doesn't know how he expected to take care of some 300 cattle on 120 acres in the winter, when Dr. Monroe testified that the best one can hope for is 1 cow and calf on 1 acre of prepared pasture, insofar as year round sustenance is concerned. Mr. Moity argues that he wanted to put 300 cows on 120 acres of rye grass, but he has not explained what would happen the rest of the winter insofar as winter pasture and winter feeding was concerned.

The Court is left in the dark as to why his whole 300 acres, as well as the 120 under discussion, were not all planted in September. It is also left in the dark as to why all 300 acres were planted, including the said 120 acres, before December 27, 1973, and, in spite of this, why cows were dying in February, March and April, if he replanted the 120 acres together with the 180 other acres he owned. (See Exhibit Moity #5, a bill for planting). The Court feels this confirms the fact that Mr. Moity's problem was his complete lack of experience and knowledge of the cattle business. It appears to the Court, all of his acreage should have been planted, even in stages, before December 27. His inability to make his 120 acres produce was a set back, but the Court feels that he would probably have had the same result, if the 120 acres had produced.

It would simply have delayed his ultimate problem. The Court is not informed as to what happened to the 300 acre planting.

While Mr. Moity does not have to pay for what he bought and contracted for, it seems equitable that he should be allowed the ultimate fruit of what he expected. Moity No.5 shows it cost him $7,860.00 to seed 300 acres with rye and clover. 120/300 of $7,860.00 would be $3,144.00, which was his actual cost to put himself back where he started, and which the Court feels he should receive in Judgment, in lieu of the rye grass he expected.

Counsel for Plaintiff will prepare the proper Judgment, submit same to opposing counsel for approval as to form, in writing, and present same for signature.

Opelousas, Lousiaian, this 19 day of December, 1974.

/s/ ISOM J. GUILLORY, JR.
DISTRICT JUDGE

cc: Mr. Leslie J. Schiff
Mr. Edward C. Abell

Filed December 19, 1974

/s/ A LASTRAPES
DEPUTY CLERK

A TRUE COPY

/s/ A. LASTRAPES
Deputy Clerk

OFFICE OF CLERK

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

P. O. BOX 3000
LAKE CHARLES

Appendix "F"

Dear Sir:

Attached you will find a copy of opinion in a case in which you are an attorney of record.

Your attention is invited to Rule XI of the Uniform Rules of the Courts of Appeal, especially the following sections:

"Section 1. Notice of judgments of the court will be delivered personally, or by certified or registered mail, by the clerk of court to at least one of counsel for each of the parties litigant, and applications for rehearing and briefs in support thereof must be filed in septuple copies on or before the fourteenth calendar day after, but not including, the date of receipt of such notice, and no extension of time therefor shall be granted. (Emphasis supplied.)

"Section 2. In the case of an application for rehearing sent through the mail for filing, it shall be deemed timely filed when the official U.S. postmark upon the envelope transmitting such application shows that it was mailed on or before the fourteenth calendar day following the date notice of the pertinent judgment was given, as reflected by the records maintained by the clerk of court.

"Section 3. If the applicant for rehearing desires further time for filing of brief in support of his application, he shall request additional time in his application and the court may grant or refuse such delay in its descretion.

Cordially yours,

/s/KENNETH J. de BLANC
Clerk of Court

NUMBER 5793

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

WARREN J. MOITY

PLAINTIFF, APPELLANT

VERSUS

SWIFT AGRICULTURAL CHEMICAL CORPORATION

DEFENDANT-APPELLEE

APPEAL FROM THE TWENTY-SEVENTH JUDICIAL DISTRICT COURT, PARISH OF ST. LANDRY, STATE OF LOUISIANA; HONORABLE ISOM J. GUILLORY, JR., DISTRICT JUDGE, PRESIDING.

BEFORE: HOOD, GUIDRY AND FORET, JUDGES

FORET, JUDGE

Plaintiff-appellant, Warren J. Moity, instituted this suit against Swift[1] Agricultural Chemical Corporation alleging a breach of contract involving rye grass seed purchased by Moity from Swift having allegedly failed to germinate, resulting in various items of damage to Moity.

[1] Effective January 1, 1973, dedendant's corporate name was changed to Swift Chemical Company."

The trial court granted judgment in favor of Moity in the amount of Three Thousand One Hundred Forty-Four and no/100 $3,144.00) Dollars on February 28, 1975, but then amended the judgment to grant a portion of the reconventional demand of Swift against Moity in the total amount of Six Hundred Two and 22/100 ($602.22) Dollars, being the cost of items furnished to Moity by Swift which were unrelated to the rye grass crop. Both parties appealed.

Swift, in the appeal, maintains that the trial court committed manifest error in concluding that the defendant breached the contract to furnish fertilizer and seed that would perform as represented, and further that the trial court committed manifest error in finding as a fact that the ammonium nitrate burned or killed the rye grass seed in question. We agree on both assignments of error.

The record reveals that in the summer of 1973 plaintiff called defendant's plant at Lewisburg, Louisiana, and booked some rye grass seed for the coming fall. On September 19, 1973, plaintiff requested that defendant mix the rye grass seed and fertilizer together and deliver to plaintiff for planting, plaintiff telling Aubrey Miller, Plant Manager for defendant that he wanted grazing in two weeks, which according to Miller, was impossible. According to Miller, at that time, a discussion took place between plaintiff and Miller wherein Miller advised plaintiff that it was too early to plant rye grass seed on an old sod pasture, and tried to discourage him from planting at that time.

However, plaintiff insisted that he had "bought a bunch of cows" and he had to have grass to put them on to graze.

The record further reveals that on the afternoon of the 19th defendant commenced mixing rye grass seed and ammonium nitrate in the proportions which plaintiff and defendant had agreed upon, that is, four hundred pounds of ammonium nitrate to forty pounds of rye grass seed for each acre to be planted, for a total of one hundred twenty acres. While the record reveals that some memories are a little hazy on this point, the record does reveal, and this Court so finds that mixing the ammonium nitrate and rye grass seed commenced in the afternoon of September 19th, and except for an insignificant amount, all of the fertilizer and seed was spread in plaintiff's field by the afternoon of September 21st.

About a week after the planting, plaintiff went to defendant's plant in Lewisburg and filed a customer complaint form stating that his rye grass was not coming up. Plaintiff had several more discussions with defendant's agents about the alleged problems, and subsequently this litigation ensued.

The trial judge handed down written reasons for judgment. This Court agrees with his findings that the defendant furnished certified, viable seed to the plaintiff, which was certified 95% pure.

Further, the trial court correctly stated that plaintiff went into the cattle business unprepared, and that his losses were due as much to his inexperience, lack of foresight, and lack of planning, as to any other cause. However, this Court, from a review of the record and the testimony of expert witnesses, including two of plaintiff's own witnesses, Dr. Lynn J. Deselle and Dr. Daniel P. Viator, qualified agronomists, cannot agree with the trial court's finding that the ammonium nitrate "burned" or killed the seed, and consequently the seed did not germinate. The tests conducted by Dr. Deselle and his associate Dr. Viator, showed that the germination potential of the various samples of seed after 24, 48, and 72 hours of being mixed with the ammonium nitrate, was not appreciably affected under conditions similar to those which existed during the time of the year when plaintiff planted his pasture. These tests conducted by plaintiff's experts repudiate the trial court's finding that the ammonium nitrate killed or burned the rye grass seed, and accordingly we find that the trial court erred in its finding to that effect.

The overwhelming weight of the evidence from the expert witnesses is that plaintiff's decision to plant his pasture at the time that he did, September 19, was entirely too early during the season to do so.

Weather conditions are too warm for proper germination; plus, planting rye grass seed in an old sod pasture with summer grass growing therein, and at the same time fertilizing the pasture, will result in little or no germination of rye grass for the simple reason that the summer grass presently growing will continue to grow, and in fact grow even faster with fertilization. As a consequence, the germination and growth of the rye grass will be chocked out by the summer grass and hence no stand of rye grass will be achieved. Plaintiff himself testified that he had been told by a county agent that early planting would adversely affect germination. In plaintiff's depostiton, which is of record, is the following testimony:

"Q. Did you ever talk to the county agent about how early you should plant rye grass?

A. Yes.

Q. And what did he say?

A. You're better off waiting until it's cool, but I had a condition which was different.

Q. Okay, now, did he tell you why you should wait until it's cool?

A. It will be best for germination.

Q. And what was your condition that was different?

A. I needed pasture, that's why I wanted.

Q. That's why you wanted to plant it early.

A. That's why I wanted pasture early.

Q. But you knew that if the seed wouldn't germinate, you wouldn't get pasture, didn't you? I mean you know enough about farming to know that.

A. Oh, without it germinating, that's right. I think that is a fair conclusion."

All of the experts agreed that Oct.15 is about the earliest time that it is practical to get a rye grass crop when rye grass is seeded over an existing pasture. William E. Monroe, a pasture specialist for the Cooperative Extension Service at L.S.U., summed up the situation as follows regarding the overseeding of rye grass on permanent pasture:

" Our recommencation is based on research work that has been conducted at LSU. We feel that there is an absolute must, and this must is the thing that we feel has caused more failures over the past years, and that is to make sure that you remove all the excess grass from the warm season crop prior to the time that you plant your cool season grass. This is the first consideration. The second consideration is the time of seeding, and based also on research work that has been conducted, we found that if you seed rye

grass too early in the year, you lose complete stand simply because if you get rye grass up while the warm season grass is still active or still actively growing, you fertilize the rye grass, and actually what happens you get a growth of your warm season grass crowding out your cool season grass, and when the first frost comes to kill your warm season grass, then you have nothing left."

For the foregoing reasons, this Court finds that the trial court erred in awarding judgment for plaintiff, Moity, and that judgment is reversed, and Moity's suit is dismissed with prejudice.

Defendant, Swift Agricultural Chemical Corporation, had filed a reconventional demand for the amount of $3,152.22 for rice seed, ammonium nitrate and equipment for the planting and spreading thereof, and judgment is rendered in favor of Swift Agricultural Chemical Corporation and against Warren J. Moity for that amount, plus legal interest thereon from date of judicial demand. Plaintiff, Warren J. Moity, is cast for all costs of this appeal.

REVERSED IN PART, AMENDED IN PART, AND RENDERED.